Filed 4/12/19 Perez v. P&M Health Care Holdings, Inc. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ROSA PEREZ et al., Plaintiffs and Respondents, v. P&M HEALTH CARE HOLDINGS, INC., Defendant and Appellant.	E069985 (Super.Ct.No. CIVDS1719820) OPINION

APPEAL from the Superior Court of San Bernardino County. Keith D. Davis, Judge. Affirmed.

Lewis Brisbois Bisgaard & Smith, Kathleen M. Walker, Staci L. Trang, Lann G. McIntyre and Mason T. Smith for Defendant and Appellant.

Sailer Law Firm, Joyce R. Fujimaki; Law Office of Herb Fox and Herb Fox for Plaintiffs and Respondents.

Defendant and appellant P&M Health Care Holdings, Inc., dba Rancho Mesa Care Center (Rancho Mesa), appeals from an order denying its petition to compel arbitration as to the nonmedical malpractice claims of plaintiffs and respondents Rosa Perez (decedent), through her successor in interest and daughter, Claudia Solorzano, and individually as to her daughter and her son, Argel Perez (collectively plaintiffs). The trial court ruled plaintiffs' claims were not subject to arbitration because there was no valid agreement to arbitrate. We affirm.

I. PROCEDURAL BACKGROUND AND FACTS

In August 2016, decedent (age 78) was diagnosed with glioblastoma. At that time, she was experiencing generalized body weakness, which impaired her ability to ambulate unassisted and take care of herself. On September 9, 2016, decedent was admitted to Rancho Mesa, a skilled nursing care facility located in Alta Loma. Claudia,[1] decedent's daughter and designated agent for decedent's health care,[2] filled out the necessary paperwork for admission, including a generic two-page agreement entitled, "Resident-Facility Arbitration Agreement" (the agreement). The agreement identified decedent as the resident, but failed to identify the facility. The first page of the agreement contained two independent articles, each setting forth separate agreements to arbitrate different matters. Article 1 expressly mandated arbitration of any claim alleging medical

[1] We will refer to the parties by their first names for simplicity and clarity. No disrespect is intended.

[2] Pursuant to a durable health care power of attorney.

malpractice, while article 2 mandated arbitration of all other types of claims, including statutory causes of action under the Welfare and Institutions Code.

The second page of the agreement contained two signature blocks requiring separate approval of articles 1 and 2.[3] The first signature block referred to article 1 and included a notice that "you are agreeing to have any issue of medical malpractice decided by neutral arbitration." The notice was signed and dated by Claudia only; the signature block for a representative of the facility was left blank. The second signature block referred to article 2 and is similar; however, it stated, "you are agreeing to have all claims" decided by arbitration, which would include nonmedical claims. Neither party executed the signature blocks under this warning.

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[3] Below shows the second page of the agreement, which contains two signature blocks requiring separate approval of articles 1 and 2:

NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 OF THIS CONTRACT.

Facility Representative's Signature (Date) | Resident's Signature (Date)

Title | Resident Representative/Agent Signature (Date) 9/8/2016

NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ALL CLAIMS, INCLUDING CLAIMS OTHER THAN A CLAIM FOR MEDICAL MALPRACTICE, DECIDED BY ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL.

Facility Representative's Signature (Date) | Resident's Signature (Date)

Title | Resident Representative/Agent Signature (Date)

On October 19, 2016, a certified nursing assistant (CNA) assisted decedent to the bathroom, placed her on the toilet, and instructed her to pull the call cord when she finished. The CNA stated she would be outside the bedroom door to allow for privacy. Decedent fell and, at the family's request, she was sent to the hospital. Decedent died on November 23, 2016.

On October 13, 2017, plaintiffs sued Rancho Mesa and others alleging several claims, including professional negligence.[4] Plaintiffs' claim for medical malpractice (professional negligence) is against Ghassan Hadi, M.D., only. Dr. Hadi is not a party to the agreement, has not asserted a right to arbitrate, and is not a party to this appeal. On November 27, 2017, Rancho Mesa filed a petition to compel arbitration pursuant to the agreement executed upon decedent's admission to the facility. Rancho Mesa argued the "parties mutually agreed to arbitrate claims arising out of the care and treatment rendered to the decedent, including but not limited to claims for Medical Malpractice, Negligence, Intentional Torts and Elder Abuse." In response, plaintiffs offered several arguments to challenge the validity of the agreement as to their claims. As relevant to our discussion, plaintiffs argued (1) "mutual assent is lacking as Rancho Mesa did not sign the agreement," and (2) their claims are "not subject to arbitration because Plaintiff did not execute the agreement to arbitrate [their] claims." At the hearing, the trial court denied the petition to arbitrate, concluding it could not compel arbitration because the agreement

[4] Because the other defendants are not parties to this appeal, we omit their identities.

was not signed by any representative for Rancho Mesa and did not identify the facility as a party.

II. DISCUSSION

Rancho Mesa challenges the denial of its petition to compel arbitration arguing its lack of signature on the agreement is irrelevant since its petition to enforce the arbitration process "evinced its intent to [be] bound" by the agreement. We agree with Rancho Mesa's argument that its lack of signature is irrelevant under the circumstances; however, for the reasons explained herein, we conclude there is no valid agreement to arbitrate.

A. Standard of Review.

"'In ruling on a motion to compel arbitration, the trial court shall order parties to arbitrate "if it determines that an agreement to arbitrate the controversy exists . . . ." [Citation.] "[T]he party seeking arbitration bears the burden of proving the existence of an arbitration agreement by a preponderance of the evidence, and the party opposing arbitration bears the burden of proving by a preponderance of the evidence any defense . . . ." [Citation.] In evaluating an order denying a motion to compel arbitration, """we review the arbitration agreement de novo to determine whether it is legally enforceable, applying general principles of California contract law."""' [Citation.] To the extent the trial court resolved contested facts, we review those determinations for substantial evidence. [Citation.] Finally, should our review of the arbitration provisions here at issue require statutory interpretation, we engage in such analysis independently. [Citation.]" (*Luxor Cabs, Inc. v. Applied Underwriters Captive Risk Assurance Co.* (2018) 30 Cal.App.5th 970, 977.)

B. Analysis.

1. Plaintiffs did not assert any claim for medical malpractice against Rancho Mesa.

Plaintiffs alleged the following causes of action against Rancho Mesa: (1) elder abuse and neglect (Welf. & Inst. Code, §§ 15600, 15610.57); (2) willful misconduct; (3) negligence/professional negligence based on the failure to hire sufficient, properly qualified personnel; (4) wrongful death (Code Civ. Proc., § 377.60); (5) unfair business practices (Bus & Prof. Code, § 17201); and (6) violation of the Patient's Bill of Rights (Health & Saf. Code, § 1430). Relying on the analysis in *Avila v. Southern California Specialty Care, Inc*. (2018) 20 Cal.App.5th 835 (*Avila*), plaintiffs assert none of their claims against Rancho Mesa sound in medical malpractice. We agree.

In *Avila,* the son of an elderly patient at a long-term acute care hospital sued the hospital after his father's death. (*Avila, supra,* 20 Cal.App.5th at pp. 838-839.) The suit was filed on behalf of the patient, by and through his successor in interest, and individually on the son's behalf. (*Ibid*.) Plaintiffs alleged negligence/willful misconduct, elder abuse, and wrongful death. (*Id*. at p. 839.) Defendant petitioned for arbitration on the ground the son had signed an arbitration agreement on behalf of his father. (*Id*. at pp. 838-839.) Defendant's petition for arbitration was denied. (*Id*. at p. 839.)

On appeal, the hospital challenged the court's ruling based on the holding in *Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 849 (*Ruiz*). (*Avila, supra,* 20 Cal.App.5th at pp. 841-843.) In *Ruiz,* our Supreme Court held an agreement between a patient and the health care provider to arbitrate all medical malpractice claims in accordance with Code of Civil

Procedure section 1295[5] obligates the patient's nonsignatory heirs to arbitrate their wrongful death claims arising from the provider's professional negligence when "the language of the agreement manifests an intent to bind" the heirs. (*Ruiz*, at pp. 841.) To determine whether *Ruiz* was controlling, the *Avila* court had to determine whether the case before it was "about 'professional negligence,' as defined in MICRA, or something else." (*Avila*, at p. 842.)

In its analysis, the *Avila* court noted the *Ruiz* court's focus on the intent behind Code of Civil Procedure section 1295, which contemplated that "'arbitration "of any dispute as to professional negligence of a health care provider,"' including wrongful death, . . . 'was part of MICRA's efforts to control the runaway costs of medical malpractice . . . by promoting arbitration of malpractice disputes . . . .'" (*Avila*, *supra*, 20 Cal.App.5th at p. 842.) However, the *Avila* court concluded the plaintiffs' claim was not within the scope of Code of Civil Procedure section 1295 and, thus, *Ruiz* did not apply. In reaching its conclusion, the court stated: "What matters is not the license status of the defendant, but the basis of the claims as pleaded in the complaint. If the primary basis for the wrongful death claim sounds in professional negligence as defined by MICRA, then [Code of Civil Procedure] section 1295 applies. If, [however], the primary

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[5] Code of Civil Procedure section 1295, enacted as part of the Medical Injury Compensation Reform Act of 1975 (MICRA), governs agreements between a patient and his or her health care provider to resolve professional negligence claims through binding arbitration. It defines professional negligence to include a negligent act or omission by a health care provider in rendering health care services and expressly includes claims for personal injury and wrongful death. (§ 1295, subd. (g)(2); *Avila, supra,* 20 Cal.App.5th at p. 841.)

basis is under the Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code, § 15600 et seq.) (the Act), then [Code of Civil Procedure] section 1295 does not apply and neither does *Ruiz*'s exception to the general rule that one who has not consented cannot be compelled to arbitrate." (*Avila*, at p. 842.)

The *Avila* court observed that although the plaintiffs' claims could be "categorized as professional negligence as well as elder abuse," they chose to plead their claims under the Elder Abuse and Dependent Adult Civil Protection Act (the Act). (*Avila, supra*, 20 Cal.App.5th at p. 843.) A review of the *Avila* plaintiffs' allegations of neglect supported the court's conclusion that their claims were not "within the ambit of [Code of Civil Procedure section] 1295." (*Ibid.*) The same observation applies here. Plaintiffs pled their claims against Rancho Mesa under the Act. The only claim that might be categorized as medical malpractice is the claim against Dr. Hadi. Because plaintiffs have not asserted any medical malpractice claim against Rancho Mesa, the agreement's requirement to arbitrate any medical malpractice claim does not apply.

2. Rancho Mesa's failure to execute the agreement did not invalidate it; however, its failure to identify itself as a party is fatal.

The trial court in this case concluded the agreement was unenforceable because it did not identify the facility as a party to the agreement, and no representative for Rancho Mesa had signed it. Rancho Mesa contends the trial court erred in its conclusion because, although it did not sign the document, the agreement is still binding and should be construed as requiring both Rancho Mesa and plaintiffs to submit to arbitration. We

agree the absence of Rancho Mesa's signature did not invalidate the agreement. However, the failure to identify Rancho Mesa as a party is fatal.

A "writing memorializing an arbitration agreement need not be signed by both parties in order to be upheld as a binding arbitration agreement." (*Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 176 (*Serafin*) [arbitration agreement binding on both employer and employee even though employer did not sign the document].) While the parties must communicate to each other their mutual assent to be bound by an agreement, words and acts are sufficient to demonstrate this assent. (*Id*. at p. 173.) Thus, where a party has not signed an arbitration agreement, that party's "later conduct evinces an intent to be bound by the arbitration agreement when it invoked the arbitration process" and when it filed the motion to compel arbitration. (*Id*. at pp. 176-177; see Civ. Code, § 3388 ["A party who has signed a written contract may be compelled specifically to perform it, though the other party has not signed it, if the latter has performed, or offers to perform it on his part."].)

Here, Rancho Mesa demonstrated its intent to be bound to arbitrate through the language of the agreement, its role in admitting decedent into the facility, and its subsequent actions. A Rancho Mesa representative offered a form arbitration agreement to Claudia as part of the admission packet of documents that needed to be completed for decedent's admission. By its terms, the agreement expressly provided that both parties "are giving up their constitutional" right to a jury trial. Despite its failure to sign the agreement, Rancho Mesa manifested its intent to be bound when it petitioned the trial

court to compel arbitration. We therefore conclude the trial court erred in finding that Rancho Mesa's failure to sign the agreement invalidated the contract.

Notwithstanding the above, we conclude the trial court correctly invalidated the agreement based on Rancho Mesa's failure to identify itself as a party to the contract. (*Flores v. Nature's Best Distribution, LLC* (2016) 7 Cal.App.5th 1, 9 (*Flores*).) In *Flores*, the plaintiff sued for wrongful termination, disability discrimination, and other wrongs. (*Id*. at pp. 3-4.) Defendants petitioned to compel arbitration based on a document entitled "Agreement for Alternat[iv]e Dispute Resolution" that plaintiff had signed. (*Id*. at p. 4.) The trial court denied the petition, finding the agreement to be unenforceable. (*Id*. at p. 8.) The Court of Appeal found the document to be ambiguous regarding "whether the arbitration provision . . . applied to any or all of plaintiff's claims against any or all of defendants." (*Id*. at p. 11.) In support of its finding, the court pointed out that the "signature block for the employer [was] not filled in, dated, or signed under the heading 'Authorized Employer Signature,'" and the agreement failed to identify "which entity or entities plaintiff had agreed to submit 'all legal, equitable and administrative disputes' . . . for mediation and binding arbitration." (*Id*. at p. 9.)

The facts in this case are analogous to those in *Flores, supra*, 7 Cal.App.5th 1. Here, Rancho Mesa used a form arbitration agreement, but failed to identify itself as a party and execute the signature block. (See fn. 3, *ante*.) It is, thus, ambiguous as to the identity of the entity to which the arbitration provision applies. Given this ambiguity, the trial court correctly found the agreement to be invalid.

3. The agreement is invalid because no party executed it.

Assuming we accept Rancho Mesa's argument and conclude the trial court erred in its reasoning, plaintiffs submit another reason to support the court's conclusion. They contend there is no valid contract to arbitrate their claims because neither party executed article 2 of the agreement, which provides for arbitration of nonmedical malpractice claims. We agree.

"California has a strong public policy in favor of arbitration as an expeditious and cost-effective way of resolving disputes. [Citation.] Even so, parties can only be compelled to arbitrate when they have agreed to do so. [Citation.] 'Arbitration . . . is a matter of consent, not coercion . . . .' [Citation.] Whether an agreement to arbitrate exists is a threshold issue of contract formation and state contract law. [Citations.] The party seeking to compel arbitration bears the burden of proving the existence of a valid arbitration agreement. [Citation.]" (*Avila, supra,* 20 Cal.App.5th at pp. 843-844.) An essential element of a contract is the consent of the parties. (Civ. Code, § 1550.) "'Further, the consent of the parties to a contract must be communicated by each party to the other. [Citation.] "Mutual assent is determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings."'" (*Harris v. TAP Worldwide, LLC* (2016) 248 Cal.App.4th 373, 381.)

With the above in mind, we consider the parties' alleged agreement to arbitrate. Pursuant to Health & Safety Code section 1599.81, subdivision (b), an arbitration agreement is a document that is "separate from the rest of the admission contract." The

agreement here, provides in bold text: "Residents shall not be required to sign this arbitration agreement as a condition of admission to this facility." (See Health & Saf. Code, § 1599.81, subds. (a), (b) ["(a) All contracts of admission that contain an arbitration clause shall clearly indicate that agreement to arbitration is not a precondition for medical treatment or for admission to the facility. [¶] (b) All arbitration clauses shall be included on a form separate from the rest of the admission contract. This attachment shall contain space for the signature of any applicant who agrees to arbitration of disputes."].) The agreement then offers two separate clauses, which identify the types of claims that may be subject to arbitration (medical malpractice & nonmedical malpractice), and it requires separate signatures for each clause. (Health & Saf. Code, § 1599.81, subd. (c) ["On the attachments, clauses referring to arbitration of medical malpractice claims, as provided for under Section 1295 of the Code of Civil Procedure, shall be clearly separated from other arbitration clauses, and separate signatures shall be required for each clause."].)

With respect to article 1 of the agreement (arbitration of medical malpractice claims), the record demonstrates Claudia executed the document as decedent's representative agent.[6] However, as to article 2 (arbitration of nonmedical malpractice claims), there is no signature from either party to the contract.[7] Although the absence of Rancho Mesa's signature may be excused (see discussion, *ante*, in § II.B.2), the absence

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[6] See footnote 3, *ante*.

[7] See footnote 3, *ante*.

of Claudia's signature may not. As the agreement provides, there is no requirement for residents of Rancho Mesa to agree to arbitration; however, if they decide to waive their constitutional right to try their disputes in a court of law before a jury, they must convey this decision with a signature where designated. As previously indicated, applying general California contract law to the words of the agreement, we conclude the document contemplated that articles 1 and 2 (the arbitration of disputes clauses) would be effective *only if* Claudia assented to those provisions by affixing her signature where indicated. Therefore, by not affixing her signature in the space indicated for arbitration of nonmedical malpractice claims, Claudia did not consent to arbitration of those claims. (Cf. *Marcus & Millichap Real Estate Inv. Brokerage Co. v. Hock Inv. Co.* (1998) 68 Cal.App.4th 83, 92-93.)

In response, Rancho Mesa relies on *Weiner v. Mullaney* (1943) 59 Cal.App.2d 620 (*Weiner*) to contend Claudia's initials at the bottom of the first page of the agreement are sufficient to demonstrate "her assent to arbitrate both medical malpractice claims as described in Article 1 of the page she initialed and Article 2 of the same initialed page." (See *Weiner*, at p. 634 [initials constitute signature]; see also *Estate of Manchester* (1917) 174 Cal. 417, 421 ["[W]herever placed, the fact that it was intended as an executing signature must satisfactorily appear on the face of the document itself. If it is at the end of the document, the universal custom of mankind forces the conclusion that it was appended as an execution, if nothing to the contrary appears. If placed elsewhere, it is for the court to say, from an inspection of the whole document, its language as well as its form, and the relative position of its parts, whether or not there is a positive and

satisfactory inference from the document itself that the signature was so placed with the intent that it should there serve as a token of execution."].) We disagree.

To begin with, Rancho Mesa's reliance on *Weiner* is misplaced. In that case, the issue was whether the "form" of the signature, namely initials, may sufficiently constitute the name to be relied upon. (*Weiner*, *supra*, 59 Cal.App.2d at p. 634.) In *Weiner*, the defendant did not deny writing the letters; rather, he claimed they were "not sufficiently 'subscribed' to come within the provisions of section 852 of the Civil Code, because some of the letters contain only [his] initials and others are not signed at all." (*Id.* at p. 632.) The court disagreed, finding that defendant "intended his initials to constitute his signature" because he "adopts the use of his initials 'G.J.M.' as a signature when . . . writing." (*Id*. at p. 634.) The court observed, "[s]ignature by initials has been held to be sufficient under the statute of frauds and the statute of wills." (*Id*. at p. 634.) However, the issue before this court is not one of form (whether Claudia's initials constitute her signature), but one of execution (whether the agreement, as to article 2, was "signed" by Claudia).

More importantly, Code of Civil Procedure section 1295 mandates the specifics of how a patient executes an arbitration agreement by requiring the agreement to state, immediately before the patient's signature line and in "at least 10-point bold red type," that the party is giving up the right to a jury or court trial. (Code Civ. Proc., § 1295, subd. (b).) That is precisely what the agreement provides in this case. Thus, to consent to arbitration of nonmedical malpractice claims, Claudia was required to affix her signature in the space provided on the second page of the agreement, under the paragraph

in bold red type. (See fn. 3, *ante*.) Her initials on the prior page of the agreement were not enough. (Code Civ. Proc., § 1295, subd. (b).)

III. DISPOSITION

The order denying Rancho Mesa's petition to compel arbitration is affirmed. Plaintiffs are awarded their costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.